

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 EDWARD CALE,

11 Plaintiff,

12 v.

13 THE UNITED STATES POSTAL
14 SERVICE, *et al.*,

Defendants.

CASE NO. C16-1922-JCC

ORDER ON DEFENDANTS'
MOTION TO DISMISS

15 This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 5).

16 Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral
17 argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

18 **I. BACKGROUND**

19 On November 15, 2016, Plaintiff Edward Cale filed a notice of small claims in King
20 County District Court against Defendants the United States Postal Service ("USPS") and several
21 of its employees. (Dkt. No. 1-2 at 2.) Cale sought damages for "wages, medical/counseling bills,
22 pain and suffering, extreme stress, psychological and emotional abuse, and physical assault."
23 (*Id.*) On December 16, 2016, Defendants removed the lawsuit to this Court. (Dkt. No. 1.) On
24 January 5, 2017, this Court issued an order of substitution placing the United States as the proper
25 Defendant instead of the individual USPS employees. (Dkt. No. 7.) The United States now
26 moves to dismiss for lack of subject matter jurisdiction and failure to state a claim. (Dkt. No. 5.)

1 **II. DISCUSSION**

2 **A. Subject Matter Jurisdiction**

3 A complaint must be dismissed if the court lacks subject matter jurisdiction. Fed. R. Civ.
4 P. 12(b)(1). Jurisdiction is a threshold separation of powers issue and may not be deferred until
5 trial. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). A motion to dismiss for
6 lack of jurisdiction may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.
7 2000). In facially attacking a complaint for lack of subject matter jurisdiction, the defendant
8 asserts that the allegations are insufficient on their face to confer federal jurisdiction. *Safe Air for
9 Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In reviewing a facial attack, the court
10 assumes all materials allegations in the complaint are true. *Thornhill Publ'g Co. v. General Tel.
11 Elec.*, 594 F.2d 730, 733 (9th Cir. 1979).

12 **B. FTCA Claims**

13 The Federal Tort Claims Act (“FTCA”) allows claims to be brought against the United
14 States “for injury or loss of property, or personal injury or death caused by the negligent or
15 wrongful act or omission of any employee of the Government while acting within the scope of
16 his office or employment.” 28 U.S.C. § 1346(b)(1). However, “[a]ny claim arising out of assault”
17 may not be brought against the United States. 28 U.S.C. § 2680(h).

18 The United States argues that, because Cale seeks damages for physical assault, his
19 claims must be dismissed. (Dkt. No. 5 at 3-4.) Cale failed to respond to the United States’ motion
20 and provided no evidence to contradict it. The Court considers this failure to respond “as an
21 admission that the motion has merit.” W.D. Wash. Local Civ. R. 7(b)(2). The Court thus
22 concludes that it lacks jurisdiction over Cale’s claims.

23 “Dismissal without leave to amend is improper unless it is clear, upon *de novo* review,
24 that the complaint could not be saved by any amendment.” *Krainski v. Nev. ex rel. Bd. of Regents
25 of Nev. Sys. of Higher Educ.*, 616 F.3d 963, 972 (9th Cir. 2010). Under these facts, no
26 amendment could confer subject matter jurisdiction on the Court. It would not be appropriate to

1 grant Cale leave to amend his complaint.

2 **III. CONCLUSION**

3 For the foregoing reasons, Defendants' motion to dismiss (Dkt. No. 5) is GRANTED.

4 Cale's complaint is DISMISSED with prejudice. The Clerk is DIRECTED to close this case.

5 DATED this 27th day of January 2017.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE

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